In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 378

ROBERT E. HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 16-21) is reported at 345 F.2d 126.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1965. A timely petition for rehearing was denied on June 24, 1965. The petition for a writ of certiorari was filed on July 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an element of the offense under 41 U.S.C. 51, 54, making it a crime for an employee of a prime government contractor to accept a "kickback" gratuity from a subcontractor, that the employee actually intended to influence the award of a subcontract.

STATUTE INVOLVED

At the time of the charged offense, 41 U.S.C. 51 provided in pertinent part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. * * *

41 U.S.C. 54 provides:

> Any person who shall knowingly, directly or indirectly, make or receive any such prohibited

payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

STATEMENT

Petitioner was convicted by a jury, in the United States District Court for the District of Massachusetts, under an indictment charging that, while an employee of a company holding a cost-reimbursable government contract, he accepted gifts from a subcontractor in violation of 41 U.S.C. 51.[1] He was sentenced to imprisonment for six months (R. 12). The court of appeals unanimously affirmed the conviction.

In 1956 the United States Army entered into a long-term contract with the Raytheon Manufacturing Company for the production of Hawk missiles (R. 25-27). The terms of the contract provided that the Army would reimburse Raytheon for all costs incurred in the performance of the contract, including amounts paid to subcontractors for plant renovation and construction (R. 25-27, 37).

Subcontracts for plant renovation and construction were awarded by Raytheon on the basis of recommendations submitted by its plant engineering department (R. 39, 68, 77), of which petitioner was the assistant head (R. 68, 75-76). The department drew plans and

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[1] The general manager of the subcontractor, Bernard J. Champy, was charged in the same indictment with giving petitioner the described gratuities. He was tried and convicted jointly with petitioner and was sentenced to imprisonment for one year (suspended), probation for two years, and a fine of $1,500 (R. 2-4).

specifications and then invited written bids from construction firms whose names appeared on a list of responsible companies (R. 33, 48, 77).[2] The Champy Construction Company was among these listed firms. All written bids were addressed to petitioner (R. 46, 51, 63, 78, 97-98), were received by him without being stamped with the date of receipt (R. 46, 78), and were opened by him.

At the expiration of the time for submission of bids, petitioner prepared a memorandum recommending a company for the award. Petitioner usually recommended the low bidder (R. 68, 77, 81-82). Petitioner's memorandum and the written bids were processed by the Raytheon purchasing department, and in almost all cases the company recommended by petitioner would be awarded the subcontract (R. 35-36, 39-40, 77-78, 82). Petitioner's recommendation was the factor which "carried the most weight" in the awarding of such subcontracts (R. 68, 69-70).[3] According to the testimony of the head of the Raytheon engineering department, this procedure would have permitted a person in petitioner's position to inform a favored construction firm of the lowest bid submitted, in order that the favored firm might then submit one slightly lower (R. 93).

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[2] Petitioner had the power to recommend that a company be placed on the list of prospective bidders and, unless the company were found to have a poor credit rating, it would be placed on the list (R. 87).

[3] Subcontracts for amounts under $1,000 were solicited and awarded to the lowest bidder by telephone (R. 47-48).

In 1958, when it was forseeable that numerous Raytheon subcontracts for plant renovation and construction would be necessary (R. 43-44), petitioner was having a new home constructed. On June 19, 1958, the Champy Construction Company began furnishing labor, equipment, and materials for the house (R. 99). On June 25, Champy received its first subcontract from Raytheon (R. 97). Thereafter Champy furnished over $4,500 worth of services and materials for petitioner's house (R. 99-100) and was awarded several additional subcontracts by Raytheon (R. 43, 57, 97). Petitioner never paid Champy anything for the work on his house (R. 100), despite the fact that he had obtained a $20,000 construction loan (R. 94-95). During the period that the house was being built, Champy sent petitioner itemized lists of the value of the work performed in each preceding month (R. 13-19, 101-102), but it did not carry these totals in its accounts receivable ledger (R. 102). It never sought payment from petitioner until four years later, after the F.B.I. had begun interviewing Champy officers concerning the case (R. 100, 101, 105).

The court instructed the jury, *inter alia*, that, in order to convict, it must find that (R. 118-120):

> * * * Howard was an employee or agent of Raytheon who played a part in the administrative processes by which Raytheon awarded subcontracts under [the prime contract];
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> * * * [T]he labor or materials were furnished on behalf of the Champy Construction Company

with the understanding that Howard need not pay for them and that the work and materials would be in effect a gift for the purpose of inducing Howard to effect the award of the subcontracts to the Champy Construction Company;

* * * *

Howard accepted the work and materials knowing that the work and materials were furnished for his home as an inducement for the award of some subcontracts or orders under [the prime contract].

ARGUMENT

The statute at issue covers any employee of a prime government contractor "who shall knowingly * * * receive" (41 U.S.C. 54) a gratuity "as an inducement for the award of a subcontract" (41 U.S.C. 51). Here the jury, under appropriate instructions, found that petitioner "accepted the work and materials knowing that the work and materials were furnished for his home as an inducement for the award of some subcontracts" (R. 119) and that he "received [them] as an inducement" (R. 120). Petitioner argues that his conviction should, nevertheless, be reversed because the jury was not required to find in addition that, at the time petitioner took the benefit, he actually intended to have his conduct influenced.

The statute, however, clearly supports the ruling below that it was enough that petitioner, in accepting the payment, knew that it was made with an intention to induce the award of the contract. The statute merely requires that the payment be made "as

an inducement for the award of a subcontract." The purpose of the legislation was to prevent commercial bribery where the cost of the gratuity could ultimately be charged to the United States. H. Rep. No. 212, S. Rep. No. 177, 79th Cong., 1st Sess. Whether an employee receiving a "kickback" from a prospective subcontractor actually intends to influence the award of a subcontract or whether he merely intends to defraud the subcontractor by doing nothing, the payment is for the prohibited purpose, the costs of the subcontractor rise, and this amount will presumably be reflected in the bid. The construction given the statute below is thus fully in accord with its language and purpose, and there are no decisions to the contrary.[4]

Petitioner erroneously argues (Pet. 8-10) that the court of appeals held that he need not have been in a position to influence the awarding of subcontracts. The court stated that it was unnecessary to reach that question, noting that the evidence was sufficient to support the jury's finding that he was in such a position (Pet. 20, n. 3). The trial court had specifically

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[4] In reasoning that petitioner need not actually have induced the award of a contract, the court of appeals drew an analogy between 41 U.S.C. 51 and the bribery statute, 18 U.S.C. 201 (Pet. 18-19). Petitioner's extension of the analogy to the question of intent (Pet. 7, 11-12) is unwarranted, since the bribery statute explicitly requires that the recipient of the gratuity intend to have his action influenced. The fact that the present statute is not so worded reflects the judgment that, contrary to the bribery statute, proof that the recipient intended to be influenced should not be required under 41 U.S.C. 51 and 54.

instructed that the statute was directed against an employee "who is in a position to effect the award of contracts" (R. 119), and that the jury must find that petitioner "played a part in the administrative processes by which Raytheon awarded subcontracts" (R. 118).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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